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No. 02-1531

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAURA A. FINDLEY, et al.,

Petitioners,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Respondent.

**On Petition For A Writ Of
Certiorari To The Supreme Court
Of Appeals Of West Virginia**

BRIEF IN OPPOSITION

CLARENCE E. MARTIN, III
Counsel of Record
SUSAN R. SNOWDEN
RONALD S. ROSSI
MARTIN & SEIBERT, L.C.
1164 Winchester Avenue
Martinsburg, West Virginia 25401
(304) 267-8985

*Counsel for Respondent
Nationwide Mutual Insurance
Company*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORPORATE DISCLOSURE STATEMENT

Nationwide Mutual Insurance Company is incorporated under the laws of the State of Ohio, with its home office and principal executive office in Columbus, Ohio, and is not a publicly owned company.

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INTRODUCTION

Respondent, Nationwide Mutual Insurance Company, requests that this Court deny the Petition for Writ of Certiorari filed by Laura A. Findley, et al., seeking review of the decision of the Supreme Court of Appeals for the State of West Virginia entered in this matter on December 6, 2002, the Order of the Supreme Court denying rehearing of January 16, 2003, and the January 23, 2003 Order entering final judgment on all claims and all parties.

COUNTER-STATEMENT OF THE CASE

This matter first came before the Circuit Court of Barbour County, West Virginia, in November 2000, as an individual filing by Laura Findley. On or about May 8, 2001, Ms. Findley moved the Circuit Court of Barbour County for leave to amend her Complaint to assert a putative class action. The Motion for Leave to Amend was granted by Order of the Circuit Court dated July 10, 2001, and on July 25, 2001, the Petitioner's First Amended Class Action Complaint was filed.

The underlying premise behind the Petitioner's First Amended Class Action Complaint is that the insurer did not comply with what the Petitioner believed was mandated by the West Virginia Supreme Court of Appeals in its decision of *Mitchell v. Broadnax,* 537 S.E.2d 882 (2000). Specifically, the *Mitchell* case held that the insurer was required to provide a policy premium discount for the "owned but not insured" exclusion in the automobile policy of insurance issued to the insured in *Mitchell* and that it breached its obligation by failing to appropriately adjust the

premium in accordance with the alleged statutory mandate of West Virginia Code §33-6-31(k).

In response to the plethora of litigation being instituted in the state in the aftermath of the *Mitchell* decision, the West Virginia Legislature enacted West Virginia Code §33-6-30. The Legislature noted that "certain classes of persons are seeking refunds of insurance premiums and seeking to void exclusions and other policy provisions on the basis that insurance companies allegedly failed to provide or demonstrate a reduction in premiums charged in relation to certain terms or exclusions incorporated into policies of insurance." W.Va. Code §33-6-30(b)(2).[1]

The Respondent, Nationwide Mutual Insurance Company, is the Defendant in a putative class action bearing substantially similar factual and legal allegations to those present in the *Findley v. State Farm*, 576 S.E.2d 807 (W.Va. 2002) matter. That case, *Audia v. Nationwide*

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[1] The West Virginia Legislature, being concerned with the litigation seeking refunds of premiums over a twenty (20) year period as well as claims for additional coverage, wrote:

> (c) Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered. Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.

W.Va. Code §33-6-30(c)

Mutual Insurance Co., Civil Action Number 00-C-79, is being prosecuted by the same law firm representing Laura Findley in the instant matter. The *Audia* matter is currently pending under a stay in the Circuit Court of Taylor County, West Virginia. Nationwide Mutual Insurance Company, because of the interest it has in the application of certain legal principles which would bar the *Audia* action from proceeding, filed a brief as an *Amicus Curiae* before the West Virginia Supreme Court of Appeals in the instant case. Subsequently, Nationwide Mutual Insurance Company moved to intervene in the *Findley* appeal and was granted leave to do so. In light of the fact that Nationwide was not involved in the development of the facts underlying the Circuit Court's decision in the *Findley* matter, Nationwide takes no position with regard to the specific factual development in *Findley*. *See Findley v. State Farm,* 576 S.E.2d 807 (W.Va. 2002).

It is important, however, to note that West Virginia is a state which requires preapproval by the appropriate regulatory body before rates can be charged or forms utilized by the insurance industry within its state's borders. In the instances in which Petitioner Findley complains, State Farm Mutual Insurance Company had received the necessary approval of the Insurance Commissioner prior to charging insurance rates and prior to utilizing the policy forms which were in question in the case. The Insurance Commissioner of the State of West Virginia has the exclusive role, by statute, to approve policy rates and forms in West Virginia.[2] This role has

[2] Specifically, West Virginia Code §33-6-8(a) provides: "... except as provided in section 8 ... Article 17 of this Chapter (fire and marine

(Continued on following page)

been statutorily delegated to the Insurance Commissioner by the Legislature and requires expertise which courts are normally ill-suited to provide. The Petitioner's position would have required the West Virginia Supreme Court of Appeals to engage in retroactive rate making. It was undisputed that the rates and forms at issue in the case were approved by the entity vested with the authority to make the decision, that being the Insurance Commissioner. *See* W.Va. Code §§33-6-8, 33-6-9(b), 33-20-4, *et seq.*

REASONS FOR DENYING CERTIORARI

I. Petitioner seeks federal review of the inherent power of a state's highest court to decide matters of state statutory construction.

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), Justice Brandeis noted that "[i]t is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." As

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forms), no insurance policy form . . . shall be delivered or issued for delivery in this state by an insurer unless it has been filed with and approved by the Commissioner."

Justice Cardozo further acknowledged in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), two (2) years later, "[t]his is not a case where a court, in overruling an earlier decision, has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. . . . This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal." *Id.* 287 U.S. at 364. As one commentator stated, "it is constitutional for state courts to simply acknowledge that they are making new law and to choose whether to apply it to the parties before the court or only in future cases." Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 426 (1993). Seventy (70) years later, the Petitioner's stand is not novel. The Petitioner is seeking to have this Court review a state court's decision which was based entirely on an interpretation of state law. While this Court has modified its theories in *Sunburst* somewhat with regard to instances where federal law is employed, the basic premise that state courts are the ultimate authority on interpretation and application of state law, when no constitutional infringements are made, still holds true today and remains intact.

This Court has recognized that the choice for any state of retroactive versus prospective application of a judicial decision may be determined by the juristic philosophy of the judges of the courts, their conception of law, its origin and nature. *Sunburst,* 287 U.S. at 365. This general principle of law is unaffected by *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97 (1993), which holds that when the United States Supreme Court applies a rule of

federal law to the parties before it, that rule is the controlling interpretation of federal law and is to be given retroactive application. "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Associations, Inc., et al. v. Smith,* 496 U.S. 167, 177 (1990) (citing *Great Northern Railway,* 287 U.S. at 364). "As Justice Cardozo discerned, prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *Smith, et al.,* 496 U.S. at 197. Even while curtailing the rights of federal courts, this Court continues to decide upon the retroactivity of federal decisions. However, Justice Thomas acknowledged that state courts still have the freedom to limit the retroactive operation of their own interpretation of state law. *Harper,* 509 U.S. at 99 (citations omitted).

The West Virginia Supreme Court, in applying its previous decision of *Mitchell* to *Findley*, was exercising its inherent power to interpret state law in "the light of new understanding." In Syllabus Point 6 of *Mitchell*, the West Virginia Supreme Court held that "[w]hen an insurer has failed to satisfy the statutory criteria of W.Va. Code §33-6-31(k) (Repl.Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy." *Mitchell,* 537 S.E.2d at 884. After *Mitchell*, the West Virginia Legislature undertook to amend §33-6-30 (2002) in light of the West Virginia Supreme Court's interpretation of West Virginia Code §33-6-31(k) (Repl.Vol. 1996). Then, the West Virginia Supreme Court in the instant case, while still adhering to *stare decisis* and "in light of new understanding," held that West Virginia Code

§33-6-30 (2002) "extinguish[ed] any litigable rights that have accrued as a result of [the] Court's holding in *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000), and . . . foreclose[d] lawsuits that have been initiated as a result thereof." *Findley,* 576 S.E.2d at 820. The Legislature had called the legislative enactment a "clarification" of the law so that it would have a retroactive effect and act as a bar to all pending litigation. However, the Petitioner argued before the Supreme Court of West Virginia that the legislative amendment was *not* a clarification of the law but was a substantive change which affected the Petitioner's rights.

In response to the Petitioner's argument, the West Virginia Supreme Court ruled that "in the case *sub judice*, the legislative amendments to W.Va. Code §§33-6-30(b-c) are most certainly substantive in nature." *Findley, Id.* at 820. Furthermore, in reaching this decision, the West Virginia Supreme Court noted that its decision as "'. . . the highest court of a State in the construction of its statutes . . . is the controlling rule of decision in federal courts, where there is no federal question.'"[3] *Findley*, 576 S.E.2d at 821, n. 21 (quoting *Syl. Pt.3*, in part, *Clarksburg Elec. Light Co. v. City of Clarksburg*, 35 S.E. 994, 996 (W.Va. 1900) ("The decision of the state court of last resort upon rights dependent alone upon its law, its statutes, is conclusive upon the Federal judiciary.")). *See also, Syl. Pt.4, State v. Wender*, 141 S.E.2d 359 (W.Va. 1965) ("In construing our state constitution, the Supreme Court of

[3] The West Virginia Supreme Court engaged in this analysis because of conflicting federal court opinions concerning the statutory interpretation of West Virginia Code §33-6-31(k).

Appeals is not bound by rulings of courts of other states or of the United States Supreme Court."). No federal question was presented to the West Virginia Supreme Court of Appeals when it exercised its inherent power in applying state law to hold that *Mitchell* applies "only to those exclusions to insurance coverage incorporated into policies of motor vehicle insurance on or after the effective date of our decision . . . and before the effective date of the Legislature's amendments to W.Va. Code §33-6-30 (2002) (Supp.2002), . . . " *Syl. Pt.7, Findley,* 576 S.E.2d at 810.

The Petitioner contends that this Court's decision in *Harper* which expanded upon this Court's decision in *James B. Beam Distilling Company v. Georgia, et al.*, 501 U.S. 529 (1991), should apply "with equal force to rules of state law." *See* Petition for Writ of Certiorari p.7. However, by the clear and unambiguous language of the opinion itself, *Harper* applies only to the United States Supreme Court when it considers questions involving federal law.

> [W]e accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97. State courts, in applying their own rules of the appropriateness of the applicability of retroactivity to the parties before the state court, adhere to the principle that "[w]hen questions of state law are at issue, state courts generally have the authority to determine the

retroactivity of their own decisions." *American Trucking,* 496 U.S. at 177 (citing *Great Northern Railway,* 287 U.S. at 364). As the Fourth Circuit has observed, there is a "noticeable absence in *Harper* of any statement that *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), is overruled for use in civil cases involving a question of 'pure' prospectivity or that all prospective decision making is prohibited." *Fairfax Covenant Church v. The Fairfax County School Board,* 17 F.3d 703, 710 (1994).

The New Mexico Supreme Court has recognized that "[i]t is within the inherent power of a state's highest court to give a decision prospective or retroactive application without offending constitutional principles." *Lopez v. Maez,* 651 P.2d 1269, 1276 (N.M. 1982) (citing *Molitar v. Kaneland Community Unit District No. 302,* 163 N.E.2d 89 (Ill. 1959), *cert. denied,* 362 U.S. 968 (1960)). Even after *Beam* and *Harper,* the New Mexico Supreme Court continued to observe that New Mexico jurisprudence was more consistent with the views of the minority in *Harper* and declined an invitation to follow the *Harper* rule when considering the retroactive or prospective application of a judicial decision in a civil case involving state law. *Beavers v. Johnson Controls World Services, Inc.,* 881 P.2d 1376 (N.M. 1994). Likewise, the Court of Appeals of Wisconsin also declined to follow *Harper,* noting that:

> First, *Harper* only applies to the interpretation of federal law by the United States Supreme Court. Second, a radical change in the manner in which Wisconsin appellate courts approach retroactivity analysis is within the exclusive superintending authority of the Wisconsin Supreme Court. Finally, it is within the inherent power of the

> state's highest court to give a decision prospective or retrospective application without offending constitutional principles.

In re Thiel v. Thiel, 625 N.W.2d 321, 327 (Wis. 2001) (citations omitted).

In North Carolina, its Supreme Court declined to follow the *Harper* Court's retroactivity analysis finding that "[b]ecause the case before us involves an issue of state constitutional law, the foregoing [analysis] from *Harper* is inapplicable. . . . " *City of New Bern v. The New Bern-Craven Board of Education*, 450 S.E.2d 735, 743 (N.C. 1994). The Supreme Court of Pennsylvania, as recently as December 31, 2002, determined the retroactivity analysis of *Harper* to be irrelevant to cases dealing only with state law. *Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002). The Pennsylvania Court noted that the "decision to apply a new rule of law is within the discretion of the court." *Id.* at 738. The Court went on to note that whether a new rule of law is applied retroactively or prospectively is solely within its own discretion. *Id.* Like these states, the West Virginia Supreme Court has continually held that "' . . . the highest court of a State in the construction of its statutes . . . is the controlling rule of decision in federal courts, where there is no federal question.'" *Findley*, 576 S.E.2d at 821 n. 21.

The West Virginia Supreme Court of Appeals adopted the *Chevron Oil* analysis for determining the retroactivity or prospectivity of its statutes and common law in the case of *Bradley v. Appalachian Power Co.,* 256 S.E.2d 879 (W.Va. 1979). Accord *Syl. Pt.4, Kincaid v. Mangum,* 432 S.E.2d 74 (W.Va. 1993); *Syl. Pt.4, King v. Kayak Mfg. Corp.*, 387 S.E.2d 511 (W.Va. 1989). The West Virginia Supreme Court has recognized that "[a]lthough statutes

normally operate prospectively only, judicial decisions ordinarily operate retroactively." *Ashland Oil, Inc. v. Rose,* 350 S.E.2d 531 (W.Va. 1986). The West Virginia Supreme Court of Appeals has also explained that "[t]he courts of this country long have recognized exceptions to the rule of retroactivity, however." *Id.* at 534.

The Petitioner argues that the West Virginia Supreme Court's decision not to apply *Mitchell* retroactively to her declaratory judgment action seeking the benefits of the *Mitchell* decision was a violation of due process and equal protection. Petitioner now asserts to this Court that *Mitchell* did not announce a new law, or change pre-existing law. *See* Petition for Writ of Certiorari, p.17. However, the West Virginia Supreme Court found differently. The state court found that *Mitchell* did in fact involve "substantive law, namely W.Va. Code §33-6-31(k), . . . " and that the holdings in *Mitchell* were "not clearly foreshadowed." *Findley*, 576 S.E.2d at 823 (citing *Syl. Pt.5,* in part, *Bradley*, 256 S.E.2d 879. Furthermore, the state court recognized that "while we long have held exclusions in insurance policies to be valid, we had not, prior to *Mitchell*, delineated the express requirements therefor contained in W.Va. Code §33-6-31(k)." *Id.* (footnotes omitted). Therefore, after applying the factors enumerated in *Bradley*, the West Virginia Supreme Court of Appeals declined to apply *Mitchell* retroactively to the Petitioner "in order to shield insurers from the imposition of augmented liabilities that did not clearly exist prior to the announcement of such holdings [in *Mitchell*]." *Id.*

The Petitioner also argues that the West Virginia Supreme Court's decision that "retroactively benefit[s] litigants in an initial case construing a statute, but then den[ying the same] to similarly situated litigants in

subsequent cases, . . . " conflicts with the constitutional principles of due process and equal protection. Petition for Writ of Certiorari, p.10. However, the West Virginia Supreme Court has unequivocally accepted that the *Bradley* factors for "determining whether to give full retroactivity to an opinion of [the West Virginia Supreme Court of Appeals] overruling prior precedent(s), or announcing any new rule which was not clearly foreshadowed in prior cases" can operate to accomplish exactly the result which the Petitioner argued in the state court below and to which Petitioner now objects. *Geibel v. Clark,* 408 S.E.2d 84, 89 (W.Va. 1991).

In *Geibel,* the West Virginia Supreme Court was faced with the issue of whether or not *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983) should be applied to invalidate a sheriff's tax sale which had been conducted twenty (20) years prior to the *Mennonite Board of Missions* decision. While the West Virginia Supreme Court acknowledged that it had previously and retroactively applied *Mennonite Board of Missions* sheriff's tax sale in *Lilly v. Duke,* 376 S.E.2d 122 (W.Va. 1988), the *Lilly* decision "was however, silent as to the retroactive effect, in general," *Geibel*, 408 S.E.2d at 88. After analyzing and applying the *Bradley* factors to the *Geibel* case, the state court found that it would not now generally apply *Mennonite Board of Missions* retroactively to sheriff's tax sales which had been conducted prior to the *Mennonite Board of Missions* decision because to do so would invalidate "[t]housands of sheriffs' tax sales . . . " even though, as the state court had acknowledged, it had previously applied *Mennonite Board of Missions* out of necessity to *Lilly,* 408 S.E.2d at 90.

The Petitioner's argument cannot succeed in the case *sub judice* because the state court below correctly construed and applied West Virginia law to the interpretation of a West Virginia statute and West Virginia common law regarding the issuance and governance of automobile insurance contracts within the State of West Virginia. The Petitioner cannot and has not established that there is a federal question presented in either the facts or legal inquiry in the case *sub judice*. The Petitioner is seeking this Court's review of a state court's decision to prospectively apply a state statute and state common law which is a request outside this Court's jurisdiction. 28 U.S.C. §1257(a).[4] The West Virginia Supreme Court has continually recognized that "'. . . the highest court of a State in the construction of its [state law] . . . is the controlling rule of decision in federal courts, where there is no federal question.'" *Findley, supra.*

The Petitioner asserts that the decision of the West Virginia Supreme Court in *Findley* violated the Due Process and Equal Protection Clauses of the United States Constitution. Constitutional protection afforded by the Due Process Clause encompasses fundamental, non-economic individual rights. *See Bowers v. Hardwick,* 478

[4] The Respondent recognizes that the Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a) by asserting that "[w]here the grounds of a state court's decision supplies a new and unexpected basis for a claim of a federal right by the defeated party, the claim may be raised and preserved by way of a Petition For Rehearing." *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., supra.* However, the state court's decision below did not "supply a new and unexpected basis for a claim of *federal right.*" (Emphasis added). Therefore, this Court does not have jurisdiction over the instant case.

U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977). Thus, state laws which infringe upon "fundamental" rights are protected by substantive due process and are subject to strict scrutiny. *See Washington v. Glucksberg,* 521 U.S. 702 (1997). The Petitioner has not alleged that her fundamental rights have been violated. Petitioner has argued that the Court has virtually abandoned substantive due process as it is applied to economic regulation. However, it is well settled that "rights having economic ramifications are entitled to no protection under the Due Process Clause . . . " Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 392 (1993). *See also Nebbia v. New York,* 291 U.S. 502 (1934).

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), this Court held that no federal constitutional issues arise when state courts define property or when they change their definitions of property, and therefore, this Court lacks jurisdiction to review state court decisions. *Id.* at 455-56. While procedural Due Process "extends to state action through its judicial as well as through its legislative, executive or administrative branches of government," the Due Process Clause does not prevent courts from changing their interpretation of state common law. *Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. at 680. Finally, in *Sunburst*, Justice Cardozo stated that no federal constitutional question arises when state courts "defin[e] the limits of adherence to precedent." *Sunburst*, 287 U.S. at 364-65. Therefore, as long as the state court complied with acceptable procedural due process requirements and sufficiently founded its decision upon a "fair and substantial basis," the state court's decision regarding property rights will not be disturbed because no constitutional

obligations were avoided. *See Demorset v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co., v. State of South Carolina, ex rel. Daniel*, 281 U.S. 537, 540-42 (1930); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927); *Nickel v. Cole*, 256 U.S. 222, 225 (1921); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). *See also* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 392 (1993). The West Virginia Supreme Court did not violate the Petitioner's Due Process rights in deciding not to retroactively apply *Mitchell* to the Petitioner because the Petitioner's fundamental rights were not violated and the West Virginia Supreme Court provided a "fair and substantial basis" for its decision in *Findley* under the *Bradley* retroactivity/prospective application analysis.[5] The Petitioner has also asserted that

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[5] The Petitioner argues that if a court changes the law and selects "chance beneficiaries," then the Due Process Clause is violated. Petition for Writ of Certiorari, p.17. The phrase "chance beneficiaries" first made an appearance in *Stovall v. Denno*, 388 U.S. 293, 301 (1967) wherein this Court noted that "[i]nequity arguably results from according the benefit of a new rule to the parties of the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue, but we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for the adherence to sound principles of decision-making." *Id.* at 301. *Stovall* was later overruled by *Griffith v. Kentucky*, 479 U.S. 314 (1987) which held that a newly announced constitutional rule for conducting criminal prosecutions must be applied retroactively to all cases, state or federal, pending on direct review or not yet final when the rule was announced. *Griffith*, 479 U.S. at 328. However, as was argued above, states are still free to choose either retroactive, prospective, or selective prospective application of state laws and that a state court is still the ultimate authority on interpretation and application of state law, when no constitutional infringements are made.

the West Virginia Supreme Court's decision has violated her right to Equal Protection. Again, however, the Petitioner's argument must fail. It is generally known that "the Equal Protection Clause does not forbid classifications; it simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citation omitted). This Court has further stated that "[a]ccordingly, this Court's cases are clear that unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect classification, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citation omitted).

The Petitioner has not stated any grounds which would support her claim that she, as an alleged similarly situated litigant, was deliberately selected "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Petition for Writ of Certiorari p. 16.[6] In addition, the Petitioner has not alleged how she is a

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[6] In support of her argument that the "Due Process Clause protects against arbitrary applications of law to selected beneficiaries," Petitioner cites to *Oyler v. Boles*, 368 U.S. 448, 456 (1962), for the proposition that the Due Process clause has been applied to prohibit a state from selectively applying a law to similarly situated litigants where "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." However, the holding of *Oyler* is contrary to the Petitioner's assertion but, correctly stated, stands for the proposition that "the conscious exercise of some selectivity in enforcement [of West Virginia's recidivist statute] is not in itself a federal constitutional violation" without proof or allegations that the "selection [with regard to the Petitioner] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary

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"similarly situated litigant" to the litigants in *Mitchell*. The Equal Protection Clause comprises a general rule that states must treat like cases alike but may treat unlike cases accordingly. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'") (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). It is important to note that the Petitioner's cause of action did not arise until the pronouncement of the *Mitchell* decision.

II. The choice of the West Virginia Supreme Court of Appeals to decide retroactive versus prospective application of the *Mitchell* decision was not violative of federal constitutional principles.

The *Chevron Oil* decision was, for a significant period of time, a sound and workable rule of judicial decision-making. It appears to have been employed only in rare circumstances where the impact of a "new" ruling would be especially burdensome to the justifiable reliance interests of one party or another. State courts had applied the equitable principles enunciated in *Chevron Oil* to determine the retroactivity of both state and United States Supreme Court decisions.

This Court has recognized that the choice for any state of retroactive versus prospective application of a

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classification." *Id.* at 456. The Court found that the Petitioner, in *Oyler*, had not alleged grounds to support a finding of a denial of equal protection and thus affirmed the lower court's decision. *Id.*

judicial decision may be determined by the juristic philosophy of the judges of the state courts, their conception of law, its origin and nature. *Sunburst,* 287 U.S. 358 (1932). The Petitioner, however, seeks to have this Court rule that its decisions in *Harper*, 509 U.S. 86 (1993) and its progeny hold that it is unconstitutional for a state supreme court to apply its decisions prospectively. Petitioner ignores the fact that the general principle set forth in *Sunburst* is unaffected by *Harper*.

The decision in *Harper* stands only for the proposition that when the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and is to be given retroactive application. *Harper*, 509 U.S. at 97. In *Harper,* this Court was confronted with the issue of retroactively versus prospectively applied rules of law. Retired federal employees sought refunds for state income taxes contending that the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803 (1989) should be applied retroactively. The Court in footnote nine (9) of its decision, stated:

> Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from the retroactive application" of a new one. *James Beam Distilling Co. v. Georgia,* 501 U.S. 529, 543, 111 S.Ct. 2439, 2447, 115 L.Ed.2d 481 (1991).

Harper, 509 U.S. at 95.

It should be noted that this Court referred to "federal law" in its analysis in the *Harper* decision. Even more important, the Court adopted a rule that it believed "fairly" reflected the position of the majority of the Justices in *Beam*. The new rule of law was espoused that "when this Court applies a rule of *federal law* to the parties before it, that rule is the controlling interpretation of *federal law* and must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or postdate announcement of the rule." *Harper*, 509 U.S. at 97 (emphasis added).

Irrespective of the obvious fact that *Harper* applied to federal law, Justice Scalia, concurring in *Harper,* noted that of the four justices who would still apply *Chevron Oil,* two would find *Davis* retroactive and two would find it not retroactive. As Justice Thomas noted "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, (it) cannot extend to their interpretations of federal law." *Id.* at 99 (citations omitted).

The decision of the West Virginia Supreme Court of Appeals in this case solely addresses West Virginia statutory construction. No federal law is implicated in the analysis by the Court of its own insurance statutes as enacted by the West Virginia legislature. As the Court noted, "our decision in *Mitchell* involved a matter of substantive law, namely, West Virginia Code §33-6-31(k) which had, prior to our decision therein, received sparse treatment in our judicial decisions and had not been amended by the legislature since its original enactment in 1979." *Findley*, 576 S.E.2d 807.

III. The jurisprudence of the State of West Virginia clearly allows for the prospective application of the *Mitchell* opinion.

The West Virginia Supreme Court, in its analysis of prospective versus retroactive application of the *Mitchell* decision, applied the standards that it had previously set forth in *Bradley,* 256 S.E.2d 879. In *Bradley*, *Syl. Pt.*5, the Supreme Court set forth the criteria to determine whether to extend full retroactivity of its decision. The Court stated that the following factors were to be considered:

> First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally-settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other

> courts which have determined the retroactive/prospective question in the same area of the law and their overruling decisions.

Id. at 880-881.

This rule was also applied in the case of *Devrnja v. West Virginia Board of Medicine*, 408 S.E.2d 346 (W.Va. 1991). In *Devrnja,* the West Virginia Supreme Court applied the *Bradley* test to determine the retroactive versus prospective application of its decisions. The Court distinguished the application of *Beam Distilling* in resolving the selective prospectivity issues. As the West Virginia Supreme Court noted "[w]e decline to unravel this tangled federal scheme because we deal with a state adjudication based on state constitutional grounds." *Devrnja*, 408 S.E.2d at 349. West Virginia's Supreme Court has remained consistent in its analysis of retroactive and prospective application of the law. This analysis is patterned after the West Virginia Supreme Court's belief that "in construing our state constitution, the Supreme Court of Appeals is not bound by rulings of courts of other states or of the United States Supreme Court." *Clarksburg Elec. Light Co.*, 35 S.E. at 996.

In the case of *Sizemore v. State Workman's Comp. Commissioner,* 219 S.E.2d 912 (W.Va. 1975), the West Virginia Supreme Court of Appeals noted that when a request for retroactive application of the law is made it will cautiously consider whether such retrospective application is warranted. "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be

retroactive in application." *Id.* at *Syl. Pt.3.* The Court furthered its retroactive analysis in the case of *Bowers v. Wurzburg,* 519 S.E.2d 148 (W.Va. 1999), when it declined to apply its decision retroactively where, before its issuance, there existed "lack of clear authority in the state which resulted in uncertainty of the law as to the issue that it decided." *Id.* at 166.

It is the type of analysis adopted by the West Virginia Supreme Court of Appeals in the *Bradley* case which gives the state court the discretion, in extraordinary cases, to temper the harshness of a rule of retroactivity. Such an approach is generally appropriate in areas where a single decision of the Court would introduce a far reaching change in the law that could impose a dramatic new liability that was not foreseeable based upon settled understandings that had accumulated since the enactment of the legislation which was being construed. This principle was recognized by the West Virginia Supreme Court in *Findley,* when the Court acknowledged that the Petitioner's claim for relief or the request that the "Court retroactively apply our holdings in *Mitchell v. Broadnax* so as to bring within its scope an insurance contract which was entered into before this Court's decision therein, and which contract has contained the allegedly objectionable language since the date of the policy issuance." *Findley,* 576 S.E.2d at 822. Since the Supreme Court's decision in *Mitchell* involved a matter purely of substantive law which was one that had received "sparse" treatment by the judiciary and had not received legislative amendment since 1979, the Court concluded that the decision in *Mitchell* should not be applied retroactively to permit prosecution of the claim. *Id.* at 823.

The retroactive application of the *Mitchell* decision would have sent an ominous signal to the insurance carriers in the State of West Virginia concerning their ability to rely upon the West Virginia Insurance Commissioner's approval of rates and forms. The West Virginia Supreme Court's analysis as set forth succinctly in *Bradley,* provides a standard for protecting reliance interests of the insurance industry in a manner that is equitable to both the insurer and the insured. As noted by the West Virginia Supreme Court " . . . the substantial public policy issues implicated in our holdings, and explicitly identified by the Legislature in W.Va. Code §33-6-30(b), mitigate in favor of a rule of prospectiveness." *Id.*

However, the Court was also cognizant of the right of an insured to bring a cause of action under W.Va. Code §33-6-30(b-c). A specific holding of the state Supreme Court was that " . . . the holdings of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), which allow insureds to pursue a cause of action against insurers to enforce the requirements of W.Va. Code §33-6-31(k) (1995) (replacement volume 1996), apply only to those exclusions to insurance coverage incorporated into policies of motor vehicle insurance on or after the effective date of our decision therein, i.e. February 18, 2000, and before the effective date of the Legislature's amendments to W.Va. Code §33-6-30 (2002) (Supp. 2002), i.e. June 5, 2002." *Id.* The Court was cognizant of the fact that the requirements adopted in *Mitchell* were a "heretofore silent prerequisite" in holding that an insurance policy could only contain an exclusion if the issuing insurer had appropriately adjusted the corresponding premium. *Id.* at 893. By declining to apply the holdings in *Mitchell* retroactively, the Court shielded the insurers from the "imposition of augmented

substantive liabilities that did not clearly exist prior to the announcement of such holdings." *Id.*

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CLARENCE E. MARTIN, III
Counsel of Record
SUSAN R. SNOWDEN
RONALD S. ROSSI
MARTIN & SEIBERT, L.C.
1164 Winchester Avenue
Martinsburg, West Virginia 25401
(304) 267-8985

Attorneys for Respondent, Nationwide Mutual Insurance Company